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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1642

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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International Association of Machinists and Aerospace Workers, AFL-CIO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on January 9, 1974 (*infra*, p. 41a).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 491 F.2d 367 (*infra*, pp. 35a-40a). The opinion of the National Labor Relations Board is reported at 197 NLRB No. 18 (*infra*, pp. 1a-33a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1974 (*infra*, p. 41a). A petition for rehearing was denied on February 7, 1974 (*infra*, p. 42a). A formal judgment was entered on April 19, 1974 (*infra*, p. 43a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board is empowered to determine that an agreement violates the so-called "hot cargo" prohibition contained in section 8(e) of the National Labor Relations Act when that agreement has been entered into by an air carrier, excluded from the coverage of the National Labor Relations Act as a "person subject to the Railway Labor Act," and a union representing the air carrier's employees, excluded from the status of employees under the National Labor Relations Act as "individual[s] employed by an employer subject to the Railway Labor Act."

STATUTES INVOLVED

1. Section 201, Title II of the Railway Labor Act (45 U.S.C. §§ 151-188), provides that, except for the grievance adjustment procedure, Title I of that Act applicable to rail carriers is "extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, . . . and every air pilot or other person who performs any work as an employee or subordinate official of such carrier . . . ." Section 202 of the Railway Labor Act provides that the "duties, requirements, penalties, benefits, and privileges prescribed and established" by Title I, except for the

grievance adjustment procedure, "shall apply to . . . carriers by air and their employees . . . ."

The Railway Labor Act enumerates among its purposes "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions . . ." (§ 2). It makes it the duty "of all carriers . . . and employees to exert every reasonable effort to make and maintain agreements concerning" these subjects (§ 2, First). The National Mediation Board is at the center of the statutory settlement procedure in the case of "a dispute between an employee or group of employees and a carrier . . . concerning changes in rates of pay, rules or working conditions not adjusted by the parties in conference" (§ 5, First (a)). Thirty-days written notice of "an intended change in agreements" must be given (§ 6); negotiation of the intended change is mandated (§ 2, First, Second); mediation by the NMB is required if direct negotiation does not resolve the controversy (§ 5, First); if mediation is unsuccessful, the NMB must try to persuade the parties to agree to voluntary arbitration (*ibid.*); and failing these efforts, emergency board factfinding is available upon recommendation of the NMB and decision of the President (§ 10). During the pendency of every step in the proceeding, and for thirty days following its conclusion, the intended change may not be made unilaterally. (§§ 2, Seventh; 5, First; 6; 10.)

2. Air carriers and their employees are expressly excepted from the separate statutory procedure of the National Labor Relations Act (29 U.S.C. § 151). The latter Act provides that the "term 'employer' . . . shall not include . . . any person subject to the Railway Labor

Act" (§ 2(2)), and that the "term 'employee' . . . shall not include . . . any individual employed by an employer subject to the Railway Labor Act . . ." (§ 2(3)).

3. Section 8(e) of the National Labor Relations Act prohibits the so-called "hot cargo" agreement:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . .

Excepted from this prohibition are the building and construction industry [1] and the apparel and clothing industry.[2] Section 8(b)(4)(A) of the National Labor Relations Act prohibits a labor organization from

---

[1] "*Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ."

[2] "*Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer', 'any person engaged in commerce or in industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

exerting economic pressure where an object is "forcing or requiring any employer . . . to enter into any agreement which is prohibited by section 8(e) . . . ." Section 8(b)(4)(B) prohibits the so-called secondary boycott. It makes it an unfair labor practice for a labor organization to exert economic pressure where an object is:

> forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

STATEMENT

I. The Facts

Lufthansa, an international air carrier of passengers and goods, exists under the laws of the Federal Republic of Germany, and operates to and from points within the United States and other countries throughout the world (R. 34). It is a "carrier by air" within the meaning of section 201 of the Railway Labor Act, and is not an employer within the meaning of Section 2(2) of the National Labor Relations Act (*infra*, p. 3a).

Lufthansa began air transportation in the United States about June 15, 1955 (R. 74). About November 1, 1959, it started its own food preparation and catering operations at John F. Kennedy International Airport in New York to service its flights originating at that point (R. 75). Food service for its flights originating at other points in the United States continued to be provided to it by independent caterers (R. 74).

On June 30, 1961, pursuant to the procedures of the Railway Labor Act, the National Mediation Board certified the International Association of Machinists & Aerospace Workers, AFL-CIO, (IAMAW), as the representative of Lufthansa's employees within the craft or class of Kitchen and Commissary employees (R. 75, 81, 102, 147). Beginning in 1961 the IAMAW and Lufthansa entered into a successive series of collective bargaining agreements covering this class of employees (R. 75-77). The agreements recite that they are "made and entered into in accordance with the provisions of Title II of the Railway Labor Act . . ." (R. 81, 102, 147). Article II(a) of the agreements provides that Lufthansa recognizes the IAMAW "as the sole and exclusive bargaining agent for all classes and grades of . . . [commissary employees] employed by the Company . . . working within . . . the United States . . ." (R. 82, 103, 148). Article II(b) provides that "All work performed by the Company involving the work of all classes and grades of . . . [commissary employees] is recognized as coming within the jurisdiction of the International Association of Machinists and is covered by this Agreement" (*ibid.*). Through the agreement expiring on July 31, 1970, Memorandum Of Understanding No. 6, appended as part of the agreements, authorized Lufthansa to subcontract commissary work in defined circumstances (R. 97, 120):

> It Is Hereby Mutually Agreed that the Union grants a waiver of Article II(a) and (b) of the Agreement between the Company and International Association of Machinists in the following instances:
>
> (a) Work historically performed prior to the date of signing of the Agreement
>
> (b) Where catering facilities are not provided;

(c) Where the work load is such that the facilities and or personnel are not sufficient to accomplish the work, provided that no lay-off results.

In the above instances the work may be contracted out.

As of January 1969, pursuant to this contractual leave, Lufthansa was provided with catering service at Los Angeles International Airport by Continental Air Lines, at Chicago and Boston by Marriott, and at other points outside New York by others (R. 36, 37, 59, 74, 75).

On October 21-22, 1969, Lufthansa and IAMAW entered into Memorandum of Understanding No. 10 (R. 75-76, 99-100). This memorandum provided that "During the period April 1, 1970 to December 31, 1972 or until the completion of the new catering facilities, whichever occurs sooner, B[oeing] 747 aircraft at JFK airport [at New York] will be catered by Chefs Orchid Caterers" (R. 99). The premise of this agreement was recited in its preface. "Lufthansa intends to operate B 747 aircraft on its North Atlantic routes by April 1, 1970"; "the present catering facilities at JFK airport are not sufficient to accomplish the catering of B 747 aircraft"; and "Lufthansa will provide new catering facilities at JFK airport by the end of 1972 to handle such aircraft" (R. 99). Accordingly, pending this event, catering of the B 747 aircraft at JFK would be furnished by Chefs Orchid (R. 99).

On November 30, 1969, Lufthansa discontinued its use of Continental Air Lines, and on December 1, 1969, it began to use Marriott Corporation, to furnish food service to Lufthansa flights originating at Los Angeles International Airport (R. 76). Continental's commis-

sary employees are represented by the IAMAW and their employment terms are fixed by a collective bargaining agreement between Continental and IAMAW (R. 75). Marriott's employees are unrepresented (R. 37). Lufthansa's termination of Continental's services caused the layoff of four employees by Continental (R. 42, 55). Disturbed by the loss of the four jobs, the IAMAW informed Lufthansa that it should correct the situation within two or three months, which Lufthansa understood to mean that it should arrange to utilize a union caterer (R. 55).

The 1967-1970 agreement between Lufthansa and IAMAW, expiring July 31, 1970, provided for "written notice of intended change . . . served by either party in accordance with the provisions of Section 6, Title I, of the Railway Labor Act . . . at least 60 days prior to the expiration date" (R. 118). Shortly after March 1, 1970, Lufthansa received the IAMAW's notice of "proposed changes" "as required by Section 6, Title I of the Railway Labor Act" (R. 76, 145). Among the changes sought by the IAMAW was to "Delete" the allowability of contracting out incorporated in Memorandum Of Understanding No. 6 (*supra*, pp. 6-7), and to substitute for it the requirement that: "Company to provide catering facilities on all points of the system (USA), all positions to be filled as outlined by the terms and conditions of this agreement" (R. 146).

Negotiations began in May 1970 and lasted through February 12, 1971 (R. 76). One of the principal issues was the IAMAW's insistence on its proposal that Lufthansa "provide catering facilities on all points of the system" with its own employees (R. 76-77). This issue was ultimately resolved and a collective bargaining agreement reached by adoption of a compromise (R.

77). Provision was made for (1) expansion by Lufthansa of its catering facilities at John F. Kennedy Airport at New York; (2) maximum utilization of its existing facilities at that point; (3) retention at that point of a prescribed minimum number of commissary employees in specified job classifications; and (4) engagement of "Chefs Orchid for the performance of that catering service" at that point which Lufthansa "is unable to perform in its own flight kitchen . . ." (R. 196-197). For those points outside of New York at which Lufthansa did not operate catering facilities, provision was made that (R. 198):

> The Company and Union agree where catering facilities are not provided, the Company may continue to farm out the work and shall engage the following caterers to perform its catering service at the following location:
>
> | LOCATION | CATERER |
> |---|---|
> | Los Angeles | Chefs Orchid |
> | Anchorage | Northwest Airlines |
> | Boston | Marriott |
> | Philadelphia | Ogden Foods (Berlo) |
> | Chicago | Chefs Orchid |

Finally, provision was made for Lufthansa to select a caterer "to perform catering service for scheduled flights at any other location" and to change a named caterer at an existing location who "fails to meet the Company's requirements as to quality, service or price . . ." (R. 198). For initial selection at a new location or for a change at an existing location, Lufthansa shall give IAMAW "sixty (60) days written notice" of its intention to select or change, and during that period the two "shall attempt to agree upon" a caterer (R. 198). In the event that they do not agree upon a

"Union caterer" within that period, Lufthansa "may then select a caterer of its choice" (R. 198). This new agreement concluded with the recital that it "supersedes all preceding memoranda between the Company and the Union pertaining to the Union's waiver of its exclusive work jurisdiction over the performace of catering services . . ." (R. 199).

Of the caterers named in the new agreement, the employees of Marriott are unrepresented, the catering employees of Northwest Orient Airlines are represented by the IAMAW, and the catering employees of the others are represented by "some labor organization affiliated with AFL-CIO . . ." (R. 37). Pursuant to the agreement, Lufthansa notified Marriott that it was terminating its services at Los Angeles on May 15, 1971, and at Chicago on June 1, 1971, and termination was effectuated at Los Angeles on May 15, 1971 (R. 38-39). However, based on charges filed by Marriott on March 19, 1971 (R. 34), the NLRB General Counsel on May 14, 1971, issued an unfair labor practice complaint against Lufthansa and IAMAW alleging that they had violated section 8(e) of the National Labor Relations Act by entering into, maintaining, and giving effect to their compromise agreement on subcontracting of catering work (R. 5-16). Meanwhile, pursuant to section 10(1) of the National Labor Relations Act, on May 12, 1971 the cognizant NLRB Regional Director sought, and on May 26, 1971 secured, preliminary injunctive relief requiring that, pending determination of the cause by the NLRB, (1) Lufthansa and IAMAW cease effectuation of the agreement as it pertained to subcontracting of work, (2) Lufthansa rescind its notice of termination of Marriott's services at Chicago, and (3) Lufthansa resume utilization of Marriott's services at

Los Angeles (R. 38, 200-203). Accordingly, in compliance with the temporary injunction, on June 25, 1971 Lufthansa resumed using Marriott to supply food services at Los Angeles (R. 38), and presumably it did not give effect to its notice of termination of Marriott's services at Chicago.

II. The Decision and Order of the National Labor Relations Board

The NLRB held, one member dissenting, that it "is empowered under Section 8(e) of the [National Labor Relations] Act to determine the lawfulness" of the subcontracting agreement between IAMAW and Lufthansa. It reached this conclusion despite the express terms of section 8(e) limiting its prohibitory reach to agreements between "any labor organization and *any employer* . . . ." By statutory definition Lufthansa is not an "employer" within the meaning of the National Labor Relations Act because it is excepted from that status as a "person subject to the Railway Labor Act" (§ 2(2)). By statutory definition Lufthansa's employees represented by IAMAW are not employees within the meaning of the National Labor Relations Act because they are excepted from that status as "individual[s] employed by an employer subject to the Railway Act" (§ 2(3)). Acknowledging the contrary import of "the seemingly clear language of Section 8 (e)" (*infra*, p. 9a), the NLRB nevertheless declined to give effect to the statutory definition of employer excluding from its scope "any person subject to the Railway Labor Act," and held instead that as used in section 8(e) the word "employer" has an unrestricted generic meaning. It reached this conclusion in exclusive reliance on its reading of the legislative history of

section 8(e) and of the secondary boycott provisions of section 8(b)(4)(B). (*infra*, pp. 9a-17a). Satisfied of its power to reach the question, the NLRB invalidated Lufthansa's subcontracting agreement with IAMAW on the ground that it "in effect requires Lufthansa to cease doing business with Marriott and contract only with union caterers" (*infra*, p. 9a).

In dissent, Member John H. Fanning observed that the majority's unrestricted reading of the term "employer" in section 8(e) brought within the prohibitory purview of that section entry into agreements "by railroads, airlines, the Federal and state governments and their political subdivisions, the Federal Reserve bank, wholly owned Government corporations, and nonprofit hospitals, all of which are excluded from the definition of 'employer' contained in Section 2(2) of the Act" (*infra*, pp. 23a-24a). He noted that the "language of 8(e) is itself clearly contrary to this holding . . ." (*infra*, p. 24a). And the legislative history, he concluded, confirms that plain meaning. For the "legislative history of 8(e) and of the 1959 amendments to the secondary boycott provisions of the Taft-Hartley Act demonstrate[s] . . . that Congress clearly understood that by the use of the words 'any employer' in 8(e) [it was] limiting the jurisdictional reach of the section to employers as defined in Section 2(2)" (*infra*, p. 24a).

The NLRB ordered Lufthansa and IAMAW to desist from enforcing their subcontracting agreement of February 12, 1971, or from entering into or enforcing any other agreement, whereby Lufthansa ceases or refrains or agrees to cease or refrain from doing business with Marriott (*infra*, p. 22a).

III. The Decision of the Court of Appeals

The Court of Appeals affirmed the Board's decision and enforced its order (*infra*, pp. 35a-40a). The Court of Appeals did not essay an independent inquiry into the statutory question, but deferred to the analysis of the Board, observing that "the experienced judgment of the Board is entitled to great weight on such questions of law and statutory interpretation" (*infra*, p. 39a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals, affirming the position of the NLRB, has decided an important question of the respective reach of the Railway Labor Act (RLA) and the National Labor Relations Act (NLRA) in a manner which conflicts with this Court's decisions in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969), and *Local Union No. 25, Teamsters* v. *N.Y., N.H. & Hart. R.R. Co.*, 350 U.S. 155 (1956).

1. For a brief nine months subsequent to its enactment on July 5, 1935, air carriers and their employees were covered by the NLRA. But on April 10, 1936, coverage was transferred from the NLRA to the RLA,[3] and all cases pending before the NLRB involving air carriers and their employees were removed to the NMB to "be handled to conclusion by the Mediation Board."[4] The shift was made in order to subject labor disputes arising in air and rail transportation to the same statutory regime, and to bring to the settlement of labor disputes in air transportation the identical facilities of

[3] 49 Stat. 1189, 45 U.S.C. § 181; 80 Cong. Rec. 5411 (1936).

[4] RLA, § 206, 45 U.S.C. § 186.

mediation, voluntary arbitration, and emergency board fact-finding as prevailed in rail transportation.[5]

Labor disputes in air transportation are thus within the senior statutory scheme of the RLA. "The NLRA came into being against the background of pre-existing comprehensive federal legislation regulating railway labor disputes. Sections 2(2) and (3) of the NLRA . . . expressly exempt from the Act's coverage employees and employers subject to the Railway Labor Act." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 376 (1969). This explicit definitional exclusion was designed to maintain the separation between the RLA and the NLRA as "two independent and mutually exclusive federal labor schemes." *Id.* at 377.

This division between the RLA and the NLRA, neither crossing into the other's sphere, was confirmed in 1947 when the NLRA was amended to add, define, and prohibit the commission of unfair labor practices by unions. Responding to the criticism that it was "unfair" to allow "railway workers" to engage in conduct which was forbidden to "employees in others industries", Senator Taft stated that:[6]

> I want to point out that railway labor has never been covered by the Wagner Act; it has always been covered by the Railway Labor Act, which provides a somewhat different procedure. We saw no

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[5] Hearings before the Subcommittee of the Senate Committee on Interstate Commerce on S. 2496, 74th Cong., 1st Sess. 6, 8-9, 25-27 (1935); S. Rep. No. 895, 74th Cong., 1st Sess. (1935); H. Rep. No. 2243, 74th Cong., 2d Sess. (1936).

[6] 93 Cong. Rec. 6498 (1947), in 2 Leg. Hist. LMRA 1571. "Leg. Hist. LMRA" refers to the two-volume edition of the Legislative History of the Labor Management Relations Act, 1947.

reason to change that situation, because there were no abuses which had arisen in connection with the operation of the Railway Labor Act.

"The exemption of employees of employers subject to Railway Labor Act is to make it perfectly clear that in providing remedies for unfair labor practices of unions and their agents it was not intended to include such employees."[7] And so, as this Court observed, "We think it clear that Congress, in excluding 'any person subject to the Railway Labor Act' from the statutory definition of 'employer,' carved out of the Labor Management Relations Act the railroads' employer-employee relationships which were, and are, governed by the Railway Labor Act." *Local Union No. 25, Teamsters* v. *N.Y., N.H. & Hart. R.R. Co.*, 350 U.S. 155, 160 (1956).

2. The dispute between Lufthansa and IAMAW concerning the form of subcontracting control to prevail in the performance of commissary work by and for Lufthansa is wholly within the domain of the RLA, and the solution upon which they agreed is entirely legal under the terms of the RLA. Nothing in the RLA prohibits an air or rail carrier, in compromise of a demand that all the work be performed solely by the carriers' employees, to agree that the work may be contracted out only to named firms, that the carrier and

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[7] S. Rep. No. 105, 80th Cong., 1st Sess., 19 (1947), in 1 Leg. Hist. LMRA 425. Similarly, when Congress in 1947 enacted Title II of the Labor Management Relations Act, 1947, establishing a conciliation procedure and providing for an 80-day strike injunction in the case of a national emergency, it stipulated that "The provisions of this title shall not be applicable to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time" (§ 212).

the union shall attempt to agree upon a new firm if the carrier is required to change an existing firm or initially select another firm, and that the carrier is free to select any firm of its own choice if they fail to agree upon a "Union" firm within a designated period (*supra*, pp. 8-10).[8] Had Lufthansa and IAMAW failed to reach their compromise agreement, their dispute over subcontracting would have been submitted to the successive statutory steps prescribed by the RLA of mediation, proffer of voluntary arbitration, and emergency board fact-finding if necessary (*supra*, p. 3). Had the parties "unsuccessfully exhausted the Railway Labor Act's procedures", they would then be free "to employ the full range of whatever peaceful economic power they . . . [could] muster," including on the IAMAW's part resort to strike and "picketing—whether characterized as primary or secondary . . . ." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 392-393 (1969).

3. The NLRB would displace the statutory regime of the RLA by subjecting resolution of Lufthansa's and IAMAW's subcontracting dispute to the proscriptions of section 8(e) of the NLRA banning the so-called "hot cargo" agreement. But the wording of section 8(e) itself bars that intrusion. For it reaches only an agreement between "any labor organization and any employer." And by explicit definitional exclusion Lufthansa as an air carrier is *not* an "employer" within the purview of the NLRA to which the proscriptions of section 8(e) can apply. Given the conscious and deliberate use of the definitional exclusions to maintain the

[8] See, *Order of Railroad Telegraphers* v. *Chicago and Northwestern R. Co.*, 362 U.S. 330 (1960).

division between the RLA and the NLRA, the word "employer" in section 8(e) cannot be given an unrestricted generic reach in defiance of its statutory definition designedly adopted to preclude the application of the NLRA to RLA empoyers and employees.

Nor is the IAMAW a "labor organization" within the meaning of section 8(e) when it acts as the representative of RLA employees in seeking an agreement with their RLA employer. As this Court has held, "when the traditional railway labor organizations act on behalf of employees subject to the Railway Labor Art in a dispute with carriers subject to the Railway Labor Act, the organizations must be deemed, *pro tanto*, exempt from the National Labor Relations Act." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 376-377 (1969). The IAMAW is a traditional railway labor organization. "The International Association of Machinists was started in Atlanta, Georgia, by nineteen railroad machinists on May 5, 1888."[9] It remains to this day the shopcraft union representing the railroad machinists.[10] And it is the dominant union representing airline ground personnel.[11]

The NLRB would have it, however, that the IAMAW is not a traditional RLA union because it "is composed overwhelmingly of nonrailroad or nonairline employees ...." (*infra*, p. 20a). This is a complete *nonsequitur*. The IAMAW is a traditional RLA union within the field relevant to the operation of the Railway Labor

[9] M. Perlman, The Machinists: A New Study in American Trade Unionism, 3 (1962).

[10] 38 N.M.B. Ann. Rep. 101-102 (1973).

[11] *Id.* at 103.

Act and nontheless so because it represents large numbers of workers in other fields as well. Whether a union is within or without the purview of the NLRA or the RLA does not depend on the happenstance of its unrelated overall composition.

4. The NLRB seeks to justify an unrestricted reading of section 8(e) of the NLRA to reach agreements between an RLA employer and a union representing RLA employees in reliance upon the 1959 legislative history of sections 8(e) and 8(b)(4)(B). But an unobfuscated analysis of that history disproves the NLRB's thesis.

(a) Numbered 8(b)(4)(A) as enacted in 1947 and 8(b)(4)(B) as amended in 1959, Congress in these sections of the NLRA prohibited the so-called secondary boycott. As originally adopted in 1947, section 8(b)(4)(A) prohibited inducement of "the employees of any employer" to engage in secondary activity. It "had been held that the term 'the employees of any employer' limited the application of the statute to those within the statutory definitions of 'employees' and 'employer.'" *N.L.R.B.* v. *Servette*, 377 U.S. 46, 51 (1964). "In view of these definitions, it was permissible for a union to induce work stoppages by minor supervisors, and farm, railway or public employees." *Id.* at 51, n. 6. To close this loophole, Congress in 1959 substituted the phrase "any individual employed by any person" for "the employees of any employer." *Id.* at 52. This "change was designed to make the provision applicable to refusals by employees who were not technically 'employees' within the statutory definitions . . ." *Ibid.* The change was accomplished by altering the wording to use lan-

guage clearly free of the restrictions of the statutory definitions, and the sponsors explicitly explained that the change was meant to prohibit inducement of rail and other nonstatutory employees. *Id.* at 53, n. 8. The change thus simply prohibited enlistment of nonstatutory employees as well as statutory employees to carry on secondary activity. It enlarged the class of employees who were not to be subject to prohibited inducement. But it did not enlarge the class of unions to which the prohibition applied over that which had formerly obtained. RLA employers, unions, and employees were as free after the change as before from the prohibitory reach of the NLRA. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

(b) Section 8(e) of the NLRA had a separate evolution. This Court had held that as originally enacted in 1947 section 8(b)(4)(A) did not invalidate entry into a hot cargo agreement or its voluntary observance but did prohibit its coercive enforcement. *Local 1976, Carpenters* v. *N.L.R.B.*, 357 U.S. 93 (1958). "Section 8(e) was designed to plug this gap in the legislation by making the 'hot cargo' clause itself unlawful." *National Woodword Manufacturers Assn.* v. *N.L.R.B.*, 386 U.S. 612, 634 (1967). Except for the building and construction industry and the apparel and clothing industry, section 8(e) prohibits "any labor organization and any employer" from entering into a hot cargo agreement and makes that agreement "unenforceable and void." The route to this result is easily traced.

The bill reported by the Senate Labor Committee did not contain any provision dealing with the hot cargo agreement. The minority on the Committee

criticized this omission.[12] On the Senate floor an amendment was thereafter adopted limited to invalidating hot cargo agreements with "a common carrier subject to Part II of the Interstate Commerce Act."[13] Extension of the invalidation to employers other than motor carriers was expressly rejected.[14]

In the House, the House Labor Committee reported a bill which also limited the invalidation of hot cargo agreements to those entered into with motor carriers.[15] The minority of the House Labor Committee criticized this limitation.[16] On the floor the House voted to invalidate hot cargo agreements entered into by "any labor organization and any employer."[17] In conference, the different reach of the two bills—the Senate bill limited to motor carriers and the House Bill extending to "any employer"— was compromised by adopting the broader coverage of "any labor organization and any employer," but by excepting from this class the building and construction industry and the clothing and apparel industry, and in that form section 8(e) was enacted.[18] The construction and

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[12] S. Min. Rep. No. 187, 86th Cong., 1st Sess., 79-80 (1959), in 1 Leg. Hist. LMRDA 79-80. "Leg. Hist. LMRDA" refers to the two-volume edition of the Labor-Management Reporting and Disclosure Act of 1959.

[13] 105 Cong. Rec. 6556-58 (1959), in 2 Leg. Hist. LMRDA 1161-63.

[14] *Ibid.*

[15] H. Rep. No. 741, 86th Cong., 1st Sess., 58, 60 (1959), in 1 Leg. Hist. LMRDA 816, 818.

[16] *Id.* at 97, in 1 Leg. Hist. LMRDA 855.

[17] 105 Cong. Rec. 15891 (1959), in 2 Leg. Hist. LMRDA 1700-01.

[18] H. Rep. No. 1147, 86th Cong., 1st Sess., 26, 27, 39, in 1 Leg. Hist. LMRDA 943; 105 Cong. Rec. 17899, 17919-20, 18153-54 (1959), in 2 Leg. Hist. LMRDA 1432, 1452-53, 1738-39.

clothing industries were exempted because of their special problems.[19]

There is thus nothing in the legislative evolution of section 8(e) which gives the slightest support to the notion that the words "any labor organization and any employer" used by it were not meant to be cabined by the statutory definitions expressly adopted to demarcate the NLRB's orbit of authority. On the contrary, when Congress did mean to bar enlistment of railroad workers and other nonstatutory employees in carrying on secondary activity, it deliberately used words free of definitional confinement and explicitly adverted to its intention to bar inducement of railroad and other nonstatutory employees (*supra*, pp. 18-19). The contrast in the case of section 8(e), both in the use of statutorily-defined limiting words and in the absence of any advertence to an enlarged meaning, eloquently bespeaks that Congress intended the literal import of its language.

Nor can the NLRB persuasively invoke the statement of Congressman Landrum on the House floor that "if such contracts are bad in one segment of our economy, they are undesirable in all segments" (*infra*, p. 14a; 105 Cong. Rec. 14343 (1959), in 2 Leg. Hist. LMRDA 1518). His remark was directed to and criticized the limitation of the hot cargo ban to motor carriers. He supported enlargement of the ban from entry into an agreement with "a common carrier subject to Part II of the Interstate Commerce Act" to entry into an agreement with "any employer." Nothing in this expansion to "any employer" sug-

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[19] *National Woodwork Manufacturers Assn.* v. *N.L.R.B.*, 386 U.S. 612, 637-639 (1967).

gests an unrestricted reach to those employers who are beyond the NLRA's statutory regime as specified by the Act's definition of that word.

Indeed, Congressman Landrum's statement is manifestly inapposite to the scope of section 8(e) as it ultimately evolved. He spoke on July 27, 1959, well before the conference agreement on September 3, 1959, which modified "any employer" to exempt the construction and clothing industries (*supra*, pp. 20-21). Given these significant exceptions, it is not even true that section 8(e) blankets those employers who are admittedly within the NLRA's statutory regime, and the universality imputed to Congressman Landrum's statement thus breaks under the weight of section 8(e) itself.

Furthermore, the exception of the construction and clothing industries because of their special problems especially dictates the conclusion that section 8(e) cannot be extended to air and rail transportation by freewheeling interpretation. This Court has already explained the exact reasons for this conclusion (*Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 392 (1969)):

> Moreover, "[f]rom the point of view of industrial relations our railroads are largely a thing apart . . . .'The railroad world is like a state within a state.'" . . . Thus, if Congress should now find that abuses in the nature of secondary activities have arisen in the railroad industry, . . . it might well decide—*as it did when it considered the garment and construction industries, see NLRA §8(e)*—that this field requires extraordinary treatment of some sort . . . Certainly, it is for the Congress, and not the courts, to strike the balance "between the uncontrolled power of management

and labor to further their respective interests." . . . The Congress has not yet done so. [Emphasis supplied.]

(c) The last bit of history on which the NLRB relies is easily dispatched. The NLRB points out that the bill as passed by the House prohibited a union from exerting economic pressure where an object was "forcing or requiring *any person* . . . to cease, *or agree to cease,* doing business with any other person . . . ." (*infra,* pp. 16a-17a; 105 Cong. Rec. 15891 (1959), in 2 Leg. Hist. LMRDA 1700; emphasis supplied). First of all, this provision does not even invalidate the hot cargo agreement, but simply bars use of economic pressure to secure one. Furthermore, this provision did not survive the conference, it being replaced by section 8(b)(4)(A) which bars a union from exerting economic pressure where an object is "forcing or requiring *any employer* . . . to enter into any agreement which is prohibited by section 8(e)." (Emphasis supplied.) Thus, section 8(b)(4)(A) was brought into precise alignment with section 8(e). As in the case of the agreement, so in the case of economic pressure to obtain it, "any employer," not "any person," is the subject of statutory protection, and economic pressure against "an employer" to assent to an agreement is barred only when the agreement is one "prohibited by section 8(e)."[20]

4. The NLRB's uncritical foray is emphasized by the observation in dissent of Member John H. Fanning who noted that the NLRB's interpretation would reach

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[20] *Conliffe Village Apartments,* 148 NLRB 854 (1964), remanded on another ground *sub nom. Northeastern Indiana Bldg. & Const. Trades Council* v. *N.L.R.B.,* 352 F.2d 696 (C.A.D.C., 1965).

agreements in alleged violation of section 8(e) entered into "by railroads, airlines, the Federal and state Governments and their political subdivisions, the Federal Reserve Bank, wholly owned Government corporations, and nonprofit hospitals, all of which are excluded from the definition of 'employer' contained in Section 2(2) of the Act" (*infra*, pp. 23a-24a). Air and rail transportation, public employment, and nonprofit hospital operation all have distinctive labor problems handled by distinctive systems of law foreign to the NLRA. The form that subcontracting control should lawfully take in these disparate fields is dependent on the demands, traditions, and operational characteristics unique to each. It may be, as section 8(e) requires in the case of NLRA employers other than those in the construction and clothing industries, that subcontracting control over firms to whom work is let should be limited to a requirement that the work shall be performed only by firms who operate under labor standards commensurate with those that prevail at the establishment that is contracting out the work.[21] Or it may be, as in the case of the construction and clothing industries excepted from section 8(e), that firms to which work may be subcontracted should be limited to those who are under union contract with the same local as represents the employees of the establishment contracting out the work, or another local of the same international union, or with an AFL-CIO affiliate. Or some other form of subcontracting control may be more appropriate. But whatever the choice may be, it is a legislative decision that is required, and Congress has not yet made it for any non-

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[21] *Meat and Highway Drivers, Local Union No. 710* v. *N.L.R.B.*, 335 F.2d 709, 715-717 (C.A.D.C., 1964).

NLRA employers, as this Court has held (*supra*, pp. 22-23).

CONCLUSION

A pure and important question of statutory interpretation concerning the jurisdictional reach of the RLA and the NLRA has been decided in a way that brings the two statutes into collision. Instead of maintaining the RLA and the NLRA as "two independent and mutually exclusive federal schemes" (*Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969)), with neither treading on the ground of the other (*Local Union No. 25, Teamsters* v. *N.Y., N.H. & Hart. R.R. Co.*, 350 U.S. U.S. 155, 159-160 (1956)), the NLRB applying its statute has invalidated an agreement legal under the terms of the RLA entered into between an RLA employer and a union representing its RLA employees. The petition should be granted.

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